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Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

No. _____

CONTIGNITRON COMPANY,

*Appellant,*

v.

STATE OF CALIFORNIA AND LEGISLATURE OF THE STATE OF CALIFORNIA,

*Appellees*

## APPEAL FROM JUDGMENT OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

## JURISDICTIONAL STATEMENT

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## QUESTIONS PRESENTED

(1) Whether the Appellant's alleged contracts with the Appellees were invalid ab initio as a matter of law under the reserved-powers doctrine because the contracts restricted the future exercise of the Appellees' police powers.

(2) Whether as a matter of law the Appellees could abrogate without consequence their alleged contracts with the Appellant by enacting legislation allegedly under the police power for what the legislature believed was a public purpose.

(3) Whether the determination by the Court of Appeal that the Appellees are immune from suit by Appellant herein by virtue of the California Tort Claims Act runs contrary to the Contract Clause of the United States Constitution.

(4) Whether the Appellant's complaint states a cause of action against the Appellees for the taking and damaging of property without compensation.

(5) Whether the Appellees can limit the remedies available to the Appellant whose property has allegedly been taken without just compensation to the repeal of the statute even though such a remedy will not restore to Appellant the value of its property.

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STATE OF CALIFORNIA AND LEGISLATURE OF THE STATE OF CALIFORNIA,

*Appellees*

## APPEAL FROM JUDGMENT OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

## JURISDICTIONAL STATEMENT

Appellant[1] respectfully prays that this Court grant this Appeal to review the judgment and opinion of the Court of

[1] Appellant was plaintiff and appellant below, Contignitron Company (hereinafter "Contignitron"). The Appellees include the defendants and appellees below. They are the State of California and the Legislature of the State of California. In addition, the Appellees include Dana Corporation (hereinafter "Dana"), The Echlin Manufacturing Company (hereinafter "Echlin") and Combustion Sciences, Inc., who were plaintiffs and appellants below. Concurrently, Dana and Echlin have by separate appeal sought review of the same judgment. With their gracious permission, Contignitron's Jurisdictional Statement parallels that of Dana and Echlin (hereinafter "Dana Brief").

Appeal of the State of California,[2] which affirmed the Superior Court's dismissal of the Appellant's complaint without leave to amend.[3]

## QUESTIONS PRESENTED

(1) Whether the Appellant's alleged contracts with the Appellees were invalid ab initio as a matter of law under the reserved-powers doctrine because the contracts restricted the future exercise of the Appellees' police powers.

(2) Whether as a matter of law the Appellees could abrogate without consequence their alleged contracts with the Appellant by enacting legislation allegedly under the police power for what the legislature believed was a public purpose.

(3) Whether the determination by the Court of Appeal that the Appellees are immune from suit by Appellant herein by virtue of the California Tort Claims Act runs contrary to the Contract Clause of the United States Constitution.

(4) Whether the Appellant's complaint states a cause of action against the Appellees for the taking and damaging of property without compensation.

(5) Whether the Appellees can limit the remedies available to the Appellant whose property has allegedly been taken without just compensation to the repeal of the statute even though such a remedy will not restore to Appellant the value of its property.

## OPINIONS BELOW

The unreported Minute Order of the Superior Court of California, County of Los Angeles entered December 6, 1977 appears in the appendix at A-5.

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[2] California Court of Appeal, Second Appellate District, Division Four (per Kingsley, Acting P.J.) (hereinafter "Court of Appeal").

[3] Superior Court of Los Angeles County (Hon. Jack T. Ryburn, Judge).

The opinion of the Court of Appeal of the State of California, Second Appellate District, Division Four, filed March 13, 1980 appears in the appendix at A-1.

The California Supreme Court denied the Appellant's Petition for Hearing on May 8, 1980 without opinion.

## JURISDICTION

The Appellant invokes this Court's jurisdiction under 28 U.S.C. Sec. 1257(2). The judgment and opinion of the Court of Appeal affirming the dismissal of Appellant's complaint with prejudice was entered on March 13, 1980. On May 8, 1980, the California Supreme Court denied the Appellant's petition for hearing. This Appeal is filed within 90 days of that denial.

## CONSTITUTIONAL PROVISIONS INVOLVED

Article 1, Sec. 10 of the United States Constitution provides in pertinent part that "No state shall . . . pass any . . . law impairing the obligation of Contracts . . . .

Article 6, cl. 2 of the United States Constitution provides in pertinent part that "This Constitution, . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The Fifth Amendment to the United States Constitution provides in pertinent part that "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the United States Constitution provides in pertinent part that "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## STATUTORY PROVISIONS INVOLVED

The Air Resources Act, Ch. 1507, § 6, 1971 Cal.Legis.Serv. 3205-06 (amending the Air Resources Act of 1967, Cal. Health and Safety Code § 39177.1 and Cal. Vehicles Code § 4602 (West) ) and the subsequent amendments pertinent to this action are set out in full in the appendix to the Dana Brief.

The relevant sections of the California Tort Claims Act of 1963 (Cal. Government Code §§ 818.2, 821 (West) ) are set out in full in the appendix to the Dana Brief.

## STATEMENT OF THE CASE

This Appeal results from the affirmance by the Court of Appeal of an order sustaining demurrers to Appellant's complaint without leave to amend. Therefore, the courts of California accepted as true the facts alleged in Appellant's complaint unless "contrary to a law or to a fact of which a court may take judicial notice." *Agins v. City of Tiburon,* ..... U.S. ....., 100 S.Ct. 2138, 2141 n.6 (1980) citing *Dale v. City of Mountain View,* 55 Cal.App.3d 101, 105, 127 Cal.Rptr. 520, 522 (1976). No other facts are before the Court for its consideration.

The Complaint stated:

In order to reduce air pollution in the State of California, in November, 1971, the Appellees enacted legislation (hereinafter "the NOx legislation") which required most 1966-1970 motor vehicles (hereinafter "subject vehicles") to be equipped with a device to be accredited by the California Air Resources Board (hereinafter "ARB") for the control of NOx emissions. In order to assure rapid installation of NOx devices, Appellees enacted the NOx legislation as an urgency statute. (A at

A-12).[4] Among the facts warranting the passage of the NOx legislation as an urgency statute was the necessity to immediately begin programs for testing and approving NOx devices and to give manufacturers time to develop such devices. (A-12).

The passage of the NOx legislation was part of a course of conduct by Appellees intended and designed to induce Appellant to design, obtain accreditation for, manufacture, and maintain an inventory of NOx emission control devices prior to the time that such devices were first required to be installed on subject vehicles. (A-13).

As part of that course of conduct, Appellees promised Appellant that if Appellant were to expend the funds to obtain accreditation for a NOx emission control device and manufacture a "sufficient" inventory of those devices, Appellees would adopt a schedule requiring installation of NOx devices on all subject vehicles. (A-13).

Appellees then delayed the previously-established installation schedules and later required Appellant to manufacture an even larger inventory of NOx devices prior to the time installation was to become mandatory. (A-13).

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[4] Appendix. Each citation to the appendix will be followed by a page number. That number corresponds to the page in the appendix at which this allegation is set forth in Contignitron's First Amended Complaint. The allegations of Contignitron's First Amended Complaint are different from the complaints of Dana and Echlin which were also dismissed, the differences being principally in the more detailed allegations in the Dana and Echlin complaints of direct personal inducements by Appellees to Dana and Echlin. The same direct personal inducements were also made to Contignitron. If Appellant should prevail on appeal, Contignitron could amend its complaint to allege virtually the same facts as Dana and Echlin. A fuller statement of the facts is set forth in the Statement of the Case in the Dana Brief.

The device designed by Appellant was accredited by the ARB on April 18, 1973, and by September 1974, Appellant had expended not less than $400,000.00 in implementation of the NOx program at the inducement of the Appellees. (A-14 and Exhibit B-2). The cost to Appellant included, among other things, research and development of the devices and the manufacture of a large inventory of NOx devices, the large inventory being a *requirement* of the ARB for accreditation. (Exhibit B-2).

On September 5, 1974, and again on April 23, 1975, the Appellees amended the Air Resources Act (A-16) (hereinafter "repeal legislation"). The amendments repealed the provision which required the mandatory installation of the NOx devices on all subject vehicles and reduced to an insignificant number the motor vehicles on which the NOx device was required to be installed. (A-16).

By enacting the repeal legislation, the State repudiated its contractual obligation with Appellant to require the installation of NOx devices on all subject vehicles, rendering the NOx devices, and the effort that went into designing and producing them, valueless. (A-16 and A-17).

## HOW FEDERAL QUESTION IS PRESENTED

The Appellant initiated this suit in the Superior Court of Los Angeles County for breach of contract, for taking of property without just compensation, and on two other grounds not discussed in this Appeal. The essence of the Appellant's alleged cause of action for breach of contract is: (1) that by means of the NOx legislation, which was passed as a result of dealings between the legislature through the ARB and the Appellant and other potential manufacturers, the Appellees promised that if Appellant designed, obtained accreditation for, manufactured, and maintained an inventory of NOx devices, the Appellees would require that each subject vehicle be equipped with a NOx device; (2) that the Appellant did all the above requisites to entering into the contract with the Ap-

pellees; (3) that it was the intent of both the Appellees and Appellant and the principal inducement for Appellant to expend the aforesaid time, effort and money that the Appellees would require and continue to require each subject vehicle to obtain an accredited device; and (4) that the Appellees breached their contract with the Appellant by enacting the repeal legislation.

The crux of the Appellant's alleged "takings" cause of action is that as a result of the Appellees' actions the Appellant has been denied *any* substantial use for the NOx devices and technology developed and manufactured by it at the request of the Appellees. Furthermore, the Appellant's property rights in the form of contractual rights to require all owners of subject vehicles to install NOx devices were taken. The Appellant contends these takings must be compensated.

Thus, the complaint of Appellant challenged the validity of the repeal legislation as a taking without compensation and as a breach and impairment of the contractual duties which the State had imposed upon itself in entering into contracts with Appellant.

The Appellees demurred to the complaint filed by Appellant. Appellees argued that the State of California was totally free to abrogate any contract with Appellant, without consequence, if the abrogation occurred in the form of legislation which the State contended was passed in the exercise of its police power. Appellees argued that any contract which limited the police power of the State was "void ab initio." Appellees also argued that the repeal of those portions of the NOx legislation making device installation mandatory was not a taking for which any compensation was required.

The Superior Court dismissed all four causes of action alleged by the Appellant without leave to amend. The court found as a matter of law that "[t]he legislature acted within its power, it cannot be estopped, the Air Resources Board was not authorized to bind the State to a contract, and any promise not to modify prior legislation is void." (A-5).

The Appellant appealed to the California Court of Appeal asserting it had alleged facts sufficient to state a claim under all theories. The Appellant argued that the alleged contracts were neither void ab initio as a restriction of the State's future exercise of its police power nor could they as a matter of law be abrogated without consequence in the exercise of the State's police power. Appellant also argued that the facts alleged were sufficient to constitute a cause of action for the taking of Appellant's property without compensation.

The Court of Appeal affirmed the Superior Court's order dismissing the Appellant's complaint with prejudice on two separate grounds. First, the court found the Appellees were, as a matter of law, immune from any suit seeking a remedy from the effect of legislation assertedly passed in the exercise of the State's police power. The court also held that the California Tort Claims Act of 1963 immunized the Appellees from suit under any of the alleged theories.

Appellant herein petitioned for a hearing before the California Supreme Court, again raising the issues that are now before this Court. The Appellant argued that the Court of Appeal misconstrued the nature of the case, ignored the Contracts Clause and the Fifth Amendment of the United States Constitution, and unconstitutionally expanded the California Tort Claims Act to deny Appellant a remedy for the violation of Appellant's constitutional rights by Appellees. The Supreme Court of California denied the Petition for Hearing on May 8, 1980.

## REASONS FOR GRANTING THE WRIT

### A. The State Did Not and Does Not Have Absolute Immunity as a Matter of Law.

The Court of Appeal for the State of California disposed of this case with two broad theories, both of which presume to provide Appellees with absolute immunity, as a matter of law,

from a suit that seeks a remedy for the effects of the alleged violation of Appellant's constitutional rights by Appellees. First, the court held that "the state is not liable for the effect of legislation enacted under the police power for what the Legislature believes is a public purpose." (A-2). Second, the court found that regardless of the claims alleged by the Appellant, the California Tort Claims Act of 1963 provides the Appellees with "an express governmental immunity." (A-3). As will be discussed below, both alleged statements of law are incorrect because they ignore the Contracts Clause and the Fifth Amendment of the United States Constitution and directly conflict with this Court's interpretation of these provisions.

1. ***The Alleged Contracts Could Not, As a Matter of Law, be Abrogated Without Consequence In the Exercise of The Appellees' Police Power.***

The Court of Appeal's opinion implies that even if a valid contract existed between the Appellant and Appellees, the Appellees are not liable for abrogating or breaking such contract if that abrogation was a result of the exercise of the police power of the State. (A-2 and A-3). This contention is contrary to law. The United States Supreme Court has made it clear that "the power of a state to modify or affect the obligation of contract is not without limit." *El Paso v. Simmons,* 379 U.S. 497, 509, 13 L.Ed.2d 446, *reh. denied* 380 U.S. 926, 13 L.Ed.2d 813 (1965). This is so even in the exercise of the state's police powers. *See United States Trust Co. v. New Jersey,* 431 U.S. 1, 52 L.Ed.2d 92 (1977); *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 57 L.Ed.2d 727, *reh. denied* 439 U.S. 886, 58 L.Ed.2d 201 (1978).

In *United States Trust Co. v. New Jersey,* 431 U.S. 1, 52 L.Ed.2d 92 (1977), this Court addressed the relationship between a state's police powers and its contractual obligations. The States of New York and New Jersey passed legislation which restricted the uses which the Port Authority (a separate governmental entity) could make of its assets. That legislation

was passed for the purpose of inducing investors to purchase Port Authority Bonds by making the investment appear more secure. The legislation, in effect, promised bondholders of the Port Authority that as long as any of the bonds remained outstanding, the Port Authority could not use pledged revenues or reserves for other than permitted purposes. In 1974 New York and New Jersey determined that the Port Authority could not operate efficiently under this restriction. Therefore, in the exercise of their police power both States repealed the legislation. Bondholders sued to challenge this repeal as an unconstitutional impairment of contract.

> *After a trial,* the [New Jersey] Court ruled that the statutory repeal was a reasonable exercise of New Jersey's police power, and declared that it was not prohibited by the Contracts Clause or by its counterpart in the New Jersey constitution. 431 U.S. at 3. (Emphasis added.)

The United States Supreme Court reversed. In so doing, the Court ruled that the assertion that the repeal of the legislation was an exercise of the police power of the State was not sufficient to insulate that action from the effects of the Contract Clause of the Constitution:

> The trial court concluded that repeal of the 1962 covenant was a valid exercise of New Jersey's police power because repeal served important public interests in mass transportation, energy conservation, and environmental protection. (Citation omitted.) *Yet the Contract Clause limits otherwise legitimate exercises of state legislative authority, and the existence of an important public interest is not always sufficient to overcome that limitation.* 431 U.S. at 21. (Emphasis added.)

The Court stated that an impairment of a contract is constitutional only if it is "reasonable and necessary to serve an important public purpose." 431 U.S. at 25. In applying this standard to contracts to which the State is a party, the Court

emphasized that "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the state's self-interest is at stake." 431 U.S. at 26.

In *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 57 L.Ed.2d 727, *reh. denied* 439 U.S. 886, 58 L.Ed.2d 201 (1978), the Court reiterated that the Contract Clause limits the power of the state to abridge existing contracts, even when the state relies upon its police power:

> If the contract Clause is to retain any meaning at all, however, it must be understood to impose *some* limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power. The existence and nature of those limits were clearly indicated in a series of cases in this Court arising from the efforts of the States to deal with the unprecedented emergencies brought on by the severe economic depression of the early 1930's. 438 U.S. at 242.

*Allied Structural Steel* involved a state's unconstitutional impairment of a private contract through the exercise of its police powers. In order to evaluate the state's interference with a private contract, the Court made a detailed factual inquiry of *the trial court record* to determine the circumstances under which the statute had been passed, the scope and purpose of the statute, and its effect upon those whose conduct it sought to prescribe. 438 U.S. at 244-51. The Court in both *United States Trust Co., supra* at 22-23 and 25-26, and in *Allied Structural Steel Co. v. Spannaus, supra* at 244, noted that "*impairments of a State's own contracts would face more stringent examination under the Contract Clause than would laws regulating contractual relationships between private parties.*" 438 U.S. at 244.

The Seventh Circuit in *E & E Hauling, Inc. v. Forest Preserve Dist.,* etc., 613 F.2d 675 (7th Cir. 1980), looked to the above cited Supreme Court cases in setting forth the proper analysis a trial court should use to determine whether a state's

impairment of its own contractual obligations is permissible. In *E & E Hauling*, the plaintiff alleged that a contract entered into by it and a county forest preserve district was impaired as a result of the promulgation and enforcement of certain ordinances subsequently passed by the district. After holding that the complaint stated a cause of action, the Court of Appeals set forth the following guidelines for the trial court to consider on remand with respect to whether the asserted impairment violated the Contract Clause:

> Not all impairments of contractual obligations are unconstitutional. (Citation omitted.) Instead a court 'must attempt to reconcile the strictures of the Contract Clause with the "essential attributes of sovereign power" . . . necessarily reserved by the States to safeguard the welfare of their citizens.' *United States Trust,* 431 U.S. at 21, 97 S.Ct. at 1517, citing *Home Building & Loan Association v. Blaisdell,* 290 U.S. 398, 435, 54 S.Ct. 231, 78 L.Ed. 413 (1934). A state does reserve broad power to adopt regulations to protect the public without being concerned with upsetting contractual obligations. This power, however, is not unlimited. A substantial impairment will be found unconstitutional when it is shown that the legislation was not reasonable and necessary to meet an important social problem. *Allied Structural Steel,* 438 U.S. at 242-44, 98 S.Ct. 2716. (Citations omitted.) In addition, the severity of the impairment 'measures the height of the hurdle the state legislation must clear.' *Allied Structural Steel,* 438 U.S. at 245, 98 S.Ct. at 2723. Thus, on remand we direct the district court, in considering whether the contract clause has been violated, to balance the District's interest in its ordinance with the degree of impairment of the plaintiff's contractual expectations. *Id.* at 681. (Footnote omitted.)

The analysis engaged in by the Supreme Court in *Allied Structural Steel* and *United States Trust Co.* shows that a state's claim that its abrogation of a contract was a proper and

justifiable exercise of legitimate police power is an affirmative defense to be proven by the state at trial. The Supreme Court has laid down standards in these cases which the state must meet in order to establish that its exercise of the police power did not violate the Contract Clause. In both *Allied Structural Steel* and *United States Trust Co.*, the states failed to meet that burden *at trial.* The Seventh Circuit in *E & E Hauling* recognized the limitations placed on a state's exercise of its police powers by the Contract Clause and remanded the case to the district court for a factual determination as to whether the exercise of the police power was reasonable and necessary to meet an important social problem.

In the case at bar, the Court of Appeal found that as a matter of law the State is not liable for the effect of any legislation "enacted under the police power for what the Legislature believes is a public purpose." (A-2). At the pleading stages, without trial to determine the reasonableness of the Appellees' asserted exercise of its police powers, the court found that the repeal of the NOx legislation did not violate the Contract Clause of the Constitution. This conflicts with the express rulings of the Supreme Court and runs contrary to the holding of the Seventh Circuit.

**B. The Court Of Appeal's Finding That Appellees Cannot Be Held Liable For A Taking Of Property By Means Of Legislation In Exercise Of Its Police Powers Raises A Novel Question Of Law Specifically Left Unanswered By This Court Last Term**

The Court of Appeal found that Appellees could not be held liable "for the effect of legislation enacted under the police power." (A-2). As applied to the takings claim asserted by the Appellant, this "basic rule" apparently reflects the application by the court of the doctrine that damages are not available in California for takings that result from inverse condemnations. In *Agins v. City of Tiburon,* ..... U.S. ....., 100 S.Ct. 2138 (1980), this Court specifically left

unanswered the question whether the State of California could limit the remedies available for an inverse condemnation that constitutes a taking to mandamus and declaratory judgment: "The State Supreme Court determined that the Appellants could not recover damages for inverse condemnation even if the zoning ordinances constituted a taking. The court stated that only mandamus and declaratory judgment are remedies available to such a landowner. Because no taking has occurred, we need not consider whether a State may limit the remedies available to a person whose land has been taken without just compensation." *Id.* at 2142-43. The immediate case provides a particularly good forum for the Court to decide this issue.

Appellant seeks compensation from Appellees for the alleged taking of its property pursuant to an inverse condemnation. As a result of Appellees' exercise of its police powers in amending the NOx legislation, Appellant has been denied any substantial or reasonable use for the NOx devices and technology and has lost the contractual rights whereby Appellees would require all owners of the subject vehicles to install NOx devices. Appellant seeks damages for this taking by Appellees because no other remedy can provide just compensation to the Appellant. Repeal of the amendments to the NOx legislation will not serve to restore to the Appellant the value of the property taken. The contract between the Appellant and Appellees required the rapid installation of smog devices on cars built in the years 1966 to 1970. (A at A-12). In 1974, there were hundreds of thousands of these cars on the road; in 1980, there are certainly fewer. By the time this case is resolved, there may well be no cars remaining. Because of the temporal nature of the value of Appellant's property, Appellant cannot be justly compensated by any remedy except damages. To allow the State of California to limit relief available for an inverse condemnation that constitutes a taking in this case denies the Appellant just compensation as required by the Fifth and Fourteenth Amendments.

### C. The California Tort Claims Act of 1963 Cannot Deny Appellant a Remedy For The Constitutional Violations Resulting From The Taking Of Petitioner's Property Without Just Compensation And The Impairment Of The Alleged Contracts Between Appellant and Appellees

The Court of Appeal held that despite the claims asserted by the Appellant "the case at bench falls squarely within an express governmental immunity" found in the California Tort Claims Act of 1963.[5] By affirming the Superior Court's dismissal with prejudice on this basis, the Court of Appeal denied the Appellant any remedy for the alleged violation of its rights under the United States Constitution. The court's holding must be interpreted to state that even if Appellees took Appellant's property without just compensation and even if the Appellees impaired their contracts with Appellant in violation of the Contract Clause, the California Tort Claims Act immunizes the Appellees from the dictates of the United States Constitution and denies the Appellant any remedy for the alleged violations of its constitutional rights.

#### 1. *The California Tort Claims Act Cannot Immunize The Appellees From The Requirements Of The Fifth Amendment To The United States Constitution*

The Fifth and Fourteenth Amendments to the United States Constitution prohibit a state from taking property for public use without just compensation. *See, e.g., Chicago, B. &*

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[5] The Court of Appeal stated:

> "No matter under what ingenious theory put forth, the case at bench falls squarely within an express governmental immunity. Section 818.2 and 821 of the Government Code read as follows:
>
> > 'A public entity is not liable for an injury caused by adopting or failing to adopt an enactment or by failing to enforce any law.
> >
> > 'A public employee is not liable for an injury caused by his adoption of or failure to adopt an enactment or by his failure to enforce an enactment.'
>
> Those sections control the case at bench." (A-3 and A-4).

*Q. R. R. Co. v. Illinois ex rel Grimwood,* 200 U.S. 561, 50 L.Ed. 596 (1906); *Appleby v. Buffalo,* 221 U.S. 524, 55 L.Ed. 838 (1911). Appellant claims that Appellees took its property without just compensation in violation of the Fifth Amendment. The Court of Appeals held, however, that the Appellees were immune from liability for the alleged taking under the California Tort Claims Act and affirmed the dismissal of Appellant's complaint. In so doing the court held a state statute supreme to the Fifth Amendment. This clearly contravenes the dictates of the Supremacy Clause which provides that, "This Constitution, . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. 6, cl. 2.

A claim of immunity similar to that raised by the Appellees was faced and disposed of by the court in *Sanfilippo v. County of Santa Cruz,* 415 F.Supp. 1340 (N.D. Cal. 1976). The court stated:

> Defendants assert that under California law public entities are immune from suits for monetary damages growing out of public enactments or permit approval procedures. While this may be true in many areas of tort law, such an immunity doctrine does not apply here. It is an elementary proposition that governmental entities are not immune from actions brought under constitutional provisions guaranteeing just compensation for public takings of private property. To hold, as defendants assert, that all land use regulations are by definition valid discretionary legislative acts would be to ignore the constitutional requirement that takings be accompanied by just compensation and to eliminate actions for inverse condemnation. Irrespective whether protection against inverse condemnation is afforded under the California Constitution, California immunity legislation could not limit the substantive rights of landowners under the 5th and 14th Amendments of the United States Constitution. *Id.* at 1343. (Footnote omitted.)

Appellant implores this Court to reverse the Court of Appeal's holding that provides Appellees immunity from the Appellant's Fifth Amendment claim and to clarify that the Appellees cannot take property for public use without just compensation.

### 2. *The California Tort Claims Act Cannot Immunize Appellees From Claims Alleging The Impairment Of A Contract In Violation Of The Contract Clause*

The Court of Appeal also affirmed the dismissal with prejudice of the Appellant's contracts claim on the grounds that the State enjoyed an absolute immunity under the California Tort Claims Act. In so doing, the court implicitly found that even if the alleged contracts existed and even if the Appellees impaired the contracts in violation of the Contract Clause of the United States Constitution, the Appellant nevertheless was not entitled to a remedy for the violation of its constitutional rights. Just as with the Appellant's Fifth Amendment claim, to hold that the State statute immunizes the Appellees from suit for the violation of Appellant's rights under the Contract Clause denies Appellant its constitutional rights and conflicts with the Supremacy Clause. As stated by the Fifth Circuit in *N.A.A.C.P. v. Thompson,* 357 F.2d 831 (5th Cir. 1966), *cert. denied* 385 U.S. 820, "any State law, which is in conflict with the United States Constitution or a law enacted by Congress in pursuance thereof, cannot be enforced. Nor can a valid State law be applied in a way to thwart the exercise of a right guaranteed by the Constitution and laws enacted by Congress in pursuance thereof." *Id.* at 833. The court in this case interpreted a State law so as to thwart the Appellant's attempt to vindicate its rights under the Contract Clause of the United States Constitution. If this Court fails to reverse this decision, the State of California as well as the other states will be free to violate constitutional rights with immunity by enacting statutes such as the California Tort Claims Act.

## CONCLUSION

For the foregoing reasons, Appellant prays this Court to note probable jurisdiction of this Appeal.

Respectfully submitted,

EGERMAN, BROWN & ROSEN
PHILIP MICHAEL BROWN

9100 Wilshire Boulevard
Beverly Hills, California 90212
Telephone: (213) 278-8855

*Counsel for Appellant*
*Contignitron Company*

CERTIFIED FOR PUBLICATION

# In the Court of Appeal of the State of California

## SECOND APPELLATE DISTRICT

## DIVISION FOUR

DANA CORPORATION, et al.,
*Plaintiffs and Appellants,*
v.
STATE OF CALIFORNIA, et al.,
*Defendants and Respondents.*

**2 Civ. No. 55838**

**(Super. Ct. No. C-158,741 Consolidated with Nos. C-176,787 C-175,498 C-177,272)**

**APPEALS from judgments (orders of dismissal) of the Superior Court, Los Angeles County. Jack T. Ryburn, Judge. Affirmed.**

**Paul, Hastings, Janofsky & Walker, Dennis H. Vaughn, Donald A. Daucher and Steven C. Kenninger for Plaintiff and Appellant Dana Corporation.**

**Munger, Tolles & Rickershauser and Dennis C. Brown for Plaintiff and Appellant Echlin Manufacturing Company.**

**Egerman, Brown & Rosen and Philip M. Brown for Plaintiff and Appellant Contignitron Company.**

**No appearance for Plaintiff and Appellant Combustion Sciences.**

**George Deukmejian, Attorney General, R. H. Connett, Assistant Attorney General, and Joel S. Moskowitz, Deputy Attorney General, for Defendants and Respondents.**

Plaintiffs appeal from judgments (orders of dismissal) entered after demurrers to their complaints were sustained without leave to amend. We affirm.

In these consolidated actions, the plaintiffs seek damages from the State of California and the Legislature, for repeal of certain legislation. In essence, the complaints (third amended complaint) allege the following:

In November 1971 the Legislature, as part of legislation intended to alleviate the problem of air pollution caused by automobiles, enacted an amendment to the Air Resources Act (c. 1507, Laws of 1971), empowering the Air Resources Board to adopt standards regulating the emission of oxides of nitrogen (NOx) and requiring the installation of devices designed to accomplish that end. There followed a long period during which the board aggressively sought manufacturers (including these plaintiffs) to conduct the necessary studies to permit the manufacture of controls, saleable at a reasonable price. During that period, the board also adopted and amended regulations setting standards for the desired devices and, from time to time, extending the date when compulsory installation of such devices would be required. Plaintiffs, in reliance on the statute, the regulations and the importunities of the board, expended substantial sums in designing the type of devices involved and, ultimately, secured approval of most of the devices so designed. In 1974, the Legislature repealed the NOx legislation, except as to a minor number of motor vehicles. As a result, the market for the devices designed by plaintiffs and approved by the Board ceased to exist, causing plaintiffs to lose the monies expended by them on the NOx program.

Demurrers to the complaints were sustained without leave to amend and this appeal followed. We affirm the dismissals.

Plaintiffs attempt to claim a right of recovery on various theories. All of the claims run afoul of the basic rule that the state is not liable for the effect of legislation enacted under the police power for what the Legislature believes is a public purpose. Plaintiffs here contend that the doctrine is subject to exceptions, citing to us two cases: *United States Trust Co. of New York* v. *New Jersey* (1977) 431 U.S. 1 and *Furey* v. *City of Sacramento* (1979) 24 Cal.3d 862. Neither case is in point here.

In *United States Trust,* bonds had been sold by an agency of the state, under a statute which strictly limited the purposes for which the capital and earnings could be used, thus insuring to the bond holders a reasonable expectancy of repayment. When the state attempted to broaden the permissible uses, the Supreme Court held that the statute under which the bonds were issued was part of the bond contract and could not be changed to the detriment of the bond holders. No such contract appears here.

In *Furey* the city had collected money from a landowner for the express purpose of constructing a sewage system useful only if the area was to be zoned industrial. When the city zoned the area for other uses, for which the sewer system was not needed, the Supreme Court held that it was obligated to refund the money paid for the now useless, sewer system. Again, the case is not in point; it is not alleged, and could not be alleged, that the state has ever received any money from the plaintiffs, or that it has, in effect, diverted plaintiffs' money to an improper use.

All that plaintiffs have alleged, or could allege, is that the Legislature, in 1971, thought that requiring NOx devices on old cars was desirable and that, by 1974, the then Legislature thought that such a requirement was not desirable. A Legislature is not liable, nor is the state liable, for a change in its perception of public interest. Many things once thought desirable, or even to be encouraged, are later thought to be undesirable and to be discouraged. An investment under the earlier legislation is not protected against a change in the Legislature's views of desirability.

No matter under what ingenious theory put forth, the case at bench falls squarely within an express governmental immunity. Sections 818.2 and 821 of the Government Code read as follows:

"A public entity is not liable for an injury caused by adopting or failing to adopt an enactment or by failing to enforce any law.

"A public employee is not liable for an injury caused by his adoption of or failure to adopt an enactment or by his failure to enforce an enactment."

Those sections control the case at bench.

The judgments (orders of dismissal) are affirmed.

CERTIFIED FOR PUBLICATION.

KINGSLEY, Acting P.J

We concur:
JEFFERSON (BERNARD), J.*
BURKE (MICHAEL L.), J.**

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* Assigned by the Chief Justice of California.
** Assigned by the Chief Justice of California.

# SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Date: December 6, 1977

| | | | |
|---|---|---|---|
| HONORABLE Jack T. Ryburn | JUDGE | M. Simpson | DEPUTY CLERK |
| HONORABLE | JUDGE PRO TEM | | |
| | | None | |
| | Deputy Sheriff | | Reporter |
| | | | (Parties and counsel checked if present) |

| | |
|---|---|
| C 158 741 | Counsel for |
| Dana Corporation, etc., | Plaintiff |
| vs. | |
| State of California, et al | Counsel for |
| | Defendant |

NATURE OF PROCEEDINGS
C 175 498
C 176 787
C 177 272

In the matter heretofore submitted for decision on December 2, 1977, the Court now rules as follows:

Demurrer of defendants State of California, Edmund G. Brown, Jr., as Governor of California, and the California Legislature is sustained on grounds as set forth below. No leave to amend.

The State has correctly set forth the legal doctrines upon which its demurrers are based. The legislature acted within its power, it cannot be estopped, the Air Resources Board was not authorized to bind the State to a contract, and any promise not to modify prior legislation is void.

The facts alleged by plaintiffs upon which the ruling on demurrer must be based, go beyond a business committing itself in reliance on the passage of legislation. Plaintiffs allege legislation passed to abate a crisis and amendments to that legislation to induce development and production of NOx devices. They also allege cooperation between plaintiffs and Air Resources Board and accreditation of certain NOx devices manufactured by the plaintiffs. Plaintiffs' reliance cannot be disputed, but despite a sympathetic approach, this Court has reluctantly concluded that plaintiffs have not and cannot state a cause of action for their loss.

The argument that the loss should be spread among all of the taxpayers of the state is one that can be made to the Legislature, but is not a basis for overruling defendants' demurrers, nor is the fact that the Legislature may find the business community much less willing to cooperate under similar circumstances in the future.

Counsel Joel Moskowitz is to give notice, and is to prepare an order of dismissal pursuant to section 581(3) of the Code of Civil Procedure.

A copy of this minute order is mailed to appearing counsel.

MINUTES ENTERED
December 6, 1977
COUNTY CLERK

# Court of Appeal of the State of California

## SECOND APPELLATE DISTRICT

DANA CORPORATION, etc.,
*Plaintiff and Appellant,*
vs.
STATE OF CALIFORNIA, etc.,
*Defendants and Respondents.*

THE ECHLIN MANUFACTURING COMPANY, etc.,
*Plaintiff and Appellant,*
vs.
STATE OF CALIFORNIA, etc.,
*Defendants and Respondents.*

CONTIGNITRON COMPANY, etc.,
*Plaintiff and Appellant,*
vs.
STATE OF CALIFORNIA, etc.,
*Defendants and Respondents.*

COMBUSTION SCIENCES, etc.,
*Plaintiff and Appellant,*
vs.
STATE OF CALIFORNIA, etc.,
*Defendants and Respondents.*

**2 Civ. No. 55838**

**(Super. Ct. No. C-158,741 Consolidated with Nos. C-176,787 C-175,498 C-177,272)**

**Received for filing in Clerk's Office Court of Appeal Second Appellate District Jul 31, 1980**

**NOTICE OF APPEAL**

EGERMAN, BROWN & ROSEN
9100 Wilshire Boulevard
Suite 600—East Tower
Beverly Hills, California 90212
(213) 278-8855
*Attorneys for Contignitron Company*

Appellant CONTIGNITRON COMPANY hereby appeals to the United States Supreme Court from the judgment of this Court entered March 13, 1980.

Appeal to the United States Supreme Court is based on 28 U.S.C. Sec. 1257(2). On May 8, 1980, the California Supreme Court denied Appellant's Petition for Hearing. This Notice of Appeal is filed within 90 days of that denial.

Dated: July 31, 1980

EGERMAN, BROWN & ROSEN

PHILIP MICHAEL BROWN
*Attorneys for Appellant*
*Contignitron Company*

**2nd Civ. No. 55838**

**(CERTIFICATE OF SERVICE BY MAIL—§2015.5, C.C.P.)**

Diann Bilke, certifies that she is a citizen of the United States, over the age of 18 years of age, a resident of the County of Los Angeles, and is not a party to the within action; that her business address is: 9100 Wilshire Boulevard, Suite 600-East Tower, Beverly Hills, California 90212; that on the 31st day of July, 1980, she served the within Notice of Appeal on the following named parties in said action, by placing a true copy thereof in an envelope addressed to the attorneys of record for said parties at the office address of said attorneys as follows:

Paul, Hastings, Janofsky & Walker
Dennis H. Vaughn
Donald A. Doucher
Steven C. Kenninger
555 S. Flower St.,
22nd Floor
Los Angeles, CA 90071

Munger, Tolles & Rickershauser
Dennis C. Brown
612 S. Flower St., 5th Floor
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Grayson, Gross, Friedman, Philips & Rasch
Saul Grayson
10880 Wilshire Blvd.,
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Los Angeles, CA 90024

George Deukmejian,
Attorney General
R. H. Connett, Assistant
Attorney General
Joel S. Moskowitz, Deputy
Attorney General
555 Capitol Mall, Suite 350
Sacramento, CA 95814

John J. Corcoran, Clerk
Los Angeles County Sup Court
111 North Hill Street
Los Angeles, CA 90012
(for Hon. Jack T. Ryburn)

and by then sealing said envelopes and depositing the same, with postage thereon fully prepaid, in the United States mail at Beverly Hills, California; that there is a delivery service by United States mail at the place so addressed, or there is a regular communication by United States mail between the place of mailing and the place so addressed.

Executed on July 31, 1980, at Beverly Hills, California.

I certify under penalty of perjury that the foregoing is true and correct.

DIANN BILKE

Diann Bilke

CLIFFORD S. DICKER
5000 Overland Avenue
Culver City, California 90230
(213) 870-2135

*Attorney for Plaintiff*

## Superior Court of the State of California

**FOR THE COUNTY OF LOS ANGELES**

CONTIGNITRON COMPANY, a California corporation,

*Plaintiff,*

vs.

STATE OF CALIFORNIA, EDMUND G. BROWN, JR., as Governor of California, THE CALIFORNIA LEGISLATURE and DOES 1 through 30, inclusive,

*Defendants.*

**CASE: 175498**

**FIRST AMENDED COMPLAINT FOR DAMAGES**

Comes now the plaintiff and for cause of action against the defendants, alleges as follows:

### FIRST CAUSE OF ACTION

(For Taking and Damaging of Property Without Compensation)

1. At all times herein mentioned, the plaintiff, CONTIGNITRON COMPANY, hereinafter referred to as "CONTIGNITRON" was and now is a corporation organized and existing under the laws of the State of California, and authorized to do business in said State of California.

2. At all times herein mentioned, the defendant, STATE OF CALIFORNIA was and is a sovereign state of the United States of America.

3. At all times herein mentioned, the defendant, LEGISLATURE OF THE STATE OF CALIFORNIA was and now is a governmental unit created by the California Constitution.

4. Defendant, EDMUND G. BROWN, JR., as Governor of California, was and now is a public official duly elected by the People of the State of California, and was and now is in control of the executive branch of the State Government of the State of California.

5. The true names and capacities of the defendants named herein as DOES 1 through 30, inclusive, are unknown to plaintiff and plaintiff therefore sues said defendants by such fictitious names. Plaintiff will ask leave of court to amend this complaint to show their true names and capacities when same have been ascertained. Each defendant sued herein by its fictitious name was in some manner responsible and legally liable for the events, happenings and damages herein alleged.

6. The defendants named herein, i.e., STATE OF CALIFORNIA, LEGISLATURE OF THE STATE OF CALIFORNIA, EDMUND G. BROWN, JR., as Governor of the State of California and DOES 1 through 30, inclusive, will be collectively referred to herein as "DEFENDANTS".

7. At all times herein mentioned each defendant was and is an agent, servant and employee of each other and of all other defendants herein, and as such agent, servant or employee, was acting within the course and scope of its agency or employment at the time and times herein alleged.

8. That on a date uncertain in the year 1967, the Air Resources Act was caused to be enacted by the defendants herein within the California Health and Safety Code, Sections 39000 et. seq. Said enactment established the Air Resources Board, which, for convenience, shall hereinafter be referred to as the "ARB".

9. In November, 1971, defendants caused to be enacted certain amendments to the Air Resources Act which required the ARB to set standards for devices to significantly reduce the emissions of oxides of nitrogen, hereinafter referred to as "NOX", from the exhaust of certain 1966 through 1970 model year motor vehicles, hereinafter referred to for convenience as the "Subject Vehicles". The ARB was vested with the authority to grant accreditation to manufacturers of specific devices which met the standards established by the ARB, said authority being contained in Chapter 1507 (1971) of California Statutes, and is hereinafter for convenience, referred to as the "NOX Legislation".

10. The "NOX Legislation" was adopted as an urgency measure and became effective on or about November 12, 1971. The urgency section of said "NOX Legislation" provides:

"Section 8: This action is an urgency statute necessary for the immediate preservation of the public peace, health or safety within the meaning of Article 4 of the Constitution and shall go into immediate effect. The facts constituting necessity are: Presently required emission control devices for motor vehicles of 1966 through 1970 models do not eliminate enough of the oxides of nitrogen to insure the health and safety of the majority of California's citizens. It is now technically feasible to produce devices which will significantly reduce these dangerous substances. To insure that such devices are installed on most of such passenger vehicles within the shortest time possible, it is necessary to immediately begin programs for testing and approving such devices. Immediate passage of this act will also give manufacturers additional time to develop such devices".

11. As is applicable herein and in pertinent part, the "NOX Legislation" provided that every 1966 through 1970 model year motor vehicle having a manufacturer's gross vehicle weight rating of under 6,001 pounds, which is subject to registration in California, shall be eqipped with an accredited exhaust emission control device.

12. Beginning in the year 1971, the defendants, and each of them, through their authorized agents, servants, employees and representatives, acting in concert, entered into a course of conduct designed to induce, encourage and require plaintiff herein to design and obtain accreditation for, and to induce, encourage and require plaintiff to manufacture and maintain, an inventory of NOX emission control devices, referred to herein for convenience as "NOX Devices". It was the plan and requirement of defendants that plaintiff develop said NOX devices and manufacture and maintain said inventory before the NOX devices were first required to be installed on the subject vehicles. Pursuant to the aforesaid course of conduct, defendants did, among other things, the following:

(a) Recruited, requested and encouraged plaintiff to design and submit a NOX device for accreditation;

(b) Based their accreditation of plaintiff's NOX device, in part, on an investigation of plaintiff's financial ability to manufacture and maintain a large inventory of the devices prior to the time installation of the devices was to be required;

(c) Required plaintiff to manufacture and maintain a large inventory of NOX devices prior to the time installation of the devices was to be required;

(d) Represented and promised to plaintiff that if plaintiff obtained its accreditation for a NOX device and if a sufficient inventory of NOX devices were manufactured, defendants would adopt an installation schedule requiring installation of NOX devices on all subject vehicles;

(e) Delayed installation schedules previously established, and on each such instance required plaintiff to manufacture and maintain an even larger inventory of NOX devices prior to the time installation of the devices was to be required.

13. Plaintiff, relying on the actions and aforesaid course of conduct to defendants, and each of them, was induced and encouraged to, and did design, obtain accreditation for, manufacture and maintain an inventory of NOX devices, expending in the process, considerable time, effort and money.

14. The "NOX Device" designed and manufactured by plaintiff was accredited by the ARB on or about April 18, 1973. A copy of said accreditation is attached hereto and made a part hereof as though fully set forth herein and marked as Exhibit "A". In approximately November, 1973, September, 1973 and July, 1974, the ARB adopted resolutions which contained schedules for installation of the "NOX Devices".

15. In November, 1972, September, 1973, and again in July, 1974, the ARB adopted resolutions which contained schedules for installation of the NOX devices.

16. On or about September 5, 1974, and again on April 23, 1975, defendants caused to be enacted certain amendments to the California Health and Safety Code, Section 39177.1, which amended the Air Resources Act, and, in effect, repealed the NOX Legislation. These amendments reduced to an insignificant number the motor vehicles on which the NOX device was required to be installed, and, together with other sections of the California Health and Safety Code, combined to prohibit the installation of the NOX devices on the vast majority of 1966 through 1970 model year motor vehicles.

17. As a result of the foregoing actions by defendants, the uses for which plaintiff's property can be utilized have been restricted to such an extent that plaintiff has been denied any substantial or reasonable use of its property. Thus, said property has been taken without compensation and its value has been diminished and damaged by an amount which is not presently known but which will be inserted with leave of court when ascertained, and plaintiff is informed, and believes, and thereon alleges, that said amount is not less than $1,800,000.00,

and plaintiff has thereby been deprived of its property without just compensation, in violation of the Constitutions of the United States and State of California.

18. Plaintiff has not been compensated by the defendants, or any of them, for said taking and damaging of its property as alleged aforesaid.

19. With respect to the acts of defendants in causing to be enacted on April 23, 1975, those certain amendments to the California Health and Safety Code, Section 39177.1, plaintiff has complied with the claim requirements of Government Code Section 900 et seq., by filing with the State Board of Control a claim for damages on or about April 9, 1976, which claim was denied on or about May 18, 1976. True copies of the claim and denial thereof are attached hereto, marked respectively as Exhibits "B" and "C", and incorporated herein by reference.

20. Plaintiff is informed and believes and thereon alleges that it is entitled under statutory and case law to reasonable attorney fees necessarily incurred in the prosecution of this action.

## SECOND CAUSE OF ACTION (ESTOPPEL)

21. Plaintiff hereby incorporates herein by reference paragraphs 1 through 20 of the First Cause of Action as though same were fully set forth herein at length.

22. Defendants knew, or should have known, that as a result of the aforesaid conduct entered into by them, and each of them, by and through their authorized agents, servants, employees and representatives, that plaintiff would be induced and encouraged to and would, in fact, design, obtain accreditation for, manufacture and maintain an inventory of "NOX Devices", before the NOX Devices were required to be installed on the subject vehicles.

23. By the actions and aforesaid course and conduct carried out by the defendants, and each of them, they were estoppeled to repeal the "NOX Legislation" if the result of

repeal was to reduce to an insignificant number the motor vehicles on which the "NOX Device" was to be installed and prohibit the installation of the "NOX Device" on the vast majority of 1966 through 1970 model year motor vehicles without compensating plaintiff for the time, effort and money it had expended in designing, obtaining accreditation, manufacturing and maintaining an inventory of the "NOX Devices."

24. As the result of the foregoing actions by the defendants, and each of them, plaintiff has been damaged in an amount not less than $1,800,000.00. When the full nature and extent of plaintiff's damages is ascertained, plaintiff will ask leave of court to amend its complaint to insert the exact amount of said damages.

**THIRD CAUSE OF ACTION (BREACH OF CONTRACT)**

25. Plaintiff incorporates herein by reference paragraphs 1 through 20 of their First Cause of Action and 20 through 24 of the Second Cause of Action as though same were fully set forth herein.

26. Defendants expressly requested plaintiff to design, obtain accreditation for, manufacture and maintain an inventory of NOX Devices before the NOX Devices were first required to be installed on the subject vehicles.

27. In conjunction with this request, defendants promised to plaintiff that they would require that each and every subject vehicle be equipped with an accredited NOX Device. Defendants further promised plaintiff that if it indeed did design, obtain an accreditation for, manufacture and maintain an inventory of NOX Devices, plaintiff would be compensated therefor.

28. Plaintiff, in reliance on the actions and aforesaid course of conduct of defendants, and in expectation that each and every subject vehicle would be required to be equipped with an accredited NOX Device and in expectation that

plaintiff would be compensated for its services, expended considerable time, effort and money in the design, obtaining accreditation for, manufacture and maintainance of an inventory of NOX devices.

29. Defendants materially and substantially breached the promises stated above when they repealed the NOX Legislation in such a manner as to reduce to an insignificant number the motor vehicles on which the NOX Device was to be installed and prohibit the installation of the NOX Device on the vast majority of 1966 through 1970 model year motor vehicles, without compensating plaintiff for the time, effort and money it has expended in designing, obtaining accreditation for, manufacturing and maintaining an inventory of the NOX Devices.

30. As the result of the foregoing breach of contract by the defendants, and each of them, plaintiff has been damaged in an amount not less than $1,800,000.00. When the full nature and extent of plaintiff's damages is ascertained, plaintiff will ask leave of court to amend its complaint to insert the exact amount of said damages.

**FOURTH CAUSE OF ACTION (UNJUST ENRICHMENT)**

31. Plaintiff incorporates herein by reference paragraphs 1 through 20 of the First Cause of Action 21 through 24 of the Second Cause of Action and 25 through 30 of the Third Cause of Action as though same were fully set forth herein at length.

32. Defendants, in causing to be enacted the Air Resources Act and the NOX Legislation, and in carrying out the aforesaid course of conduct, expressly intended to induce, encourage and require plaintiff to design, obtain accreditation for, manufacture and maintain an inventory of NOX Devices.

33. Plaintiff, in reliance on the actions and aforesaid course of conduct by defendants, and in expectation of being compensated for its services, and to the benefit of defendants, expended considerable time, effort and money in designing, obtaining accreditation for, manufacturing and maintaining an inventory of NOX Devices.

34. As a result of these services being rendered by plaintiff, defendants have been unjustly enriched by an as yet undetermined sum. When the exact amount of the sum is ascertained, plaintiff will seek leave of this court to amend its complaint to insert same.

35. Plaintiff has not been reimbursed for these services it performed at defendants' request.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, jointly and severally, as follows:

1. With respect to the First Cause of Action, the sum of $1,800,000.00, or such damages as may be shown at the time of trial;

2. With respect to the Second Cause of Action, the sum of $1,800,000.00 or such damages as may be shown at the time of trial;

3. With respect to the Third Cause of Action, the sum of $1,800,000.00 or such damages as may be shown at the time of trial;

4. With respect to the Fourth Cause of Action, the reasonable value of the services provided by plaintiff;

5. With respect to all causes of action:

a. For interest as provided by law on any sum awarded as damages;

b. For reasonable attorney's fees and costs of suit in connection with the prosecution of this action; and

c. For such other and further relief as the court deems just and proper.

DATED: August 12, 1977

CLIFFORD S. DICKER

BY: STEVEN REIN

STEVEN REIN,
*Attorney for Plaintiff*

# EXHIBIT A-1

STATE OF CALIFORNIA—RESOURCES AGENCY
AIR RESOURCES BOARD LABORATORY
1220 TELSTAR AVENUE
EL MONTE 71731

June 25, 1973

Mr. Ben L. Polo
President
Contignitron Company
9446 Borson Street
Downey, Ca. 90242

Dear Mr. Polo:

The attached Resolution 73-4-A was adopted by the Board on June 21, 1973.

John A. Maga
Executive Officer

By:

G. C. Hass, Chief
Vehicle Emissions Control Program

Attachment (1)

EXHIBIT A-2

**State of California**

**AIR RESOURCES BOARD**

**Resolution 73-4**

**April 18, 1973**

WHEREAS, the Contignitron Company of Downey, California has applied for accreditation of an oxides of nitrogen exhaust emission control system described in the staff report dated April 18, 1973 for used 1966 through 1970 model year light-duty motor vehicles of engine size classifications a, c, d, e, and f;

WHEREAS, the Board has determined that the data submitted by the applicant indicate that the system when installed on engine size classes c, d, e, and f meets the requirements set forth in Health and Safety Code Sections 39177.3 and 39177.4 and the Board's further requirements contained in Title 13, California Administrative Code, Chapter 3; and

WHEREAS, the system reduces oxides of nitrogen emissions from 1966 through 1970 model year light-duty motor vehicles of engine size classifications c, d, e, and f by more than forty-two percent on the average.

NOW, THEREFORE, BE IT RESOLVED, That the oxides of nitrogen control device submitted by Contignitron Company is hereby accredited pursuant to the provisions of Chapter 4, Part I, Division 26 of the Health and Safety Code for used 1966 through 1970 model year light-duty motor vehicles for engines of size classifications c, d, e, and f.

BE IT FURTHER RESOLVED, that this accreditation is conditional upon receipt of evidence acceptable to the Board concerning the marketing capability and the financial responsibility of Contignitron Company.

EXHIBIT A-3

**State of California**
**AIR RESOURCES BOARD**

**Resolution 73-4-A**

WHEREAS, the Contignitron Company of Downey, California, has applied for accreditation of an oxides of nitrogen exhaust emission control system described in the staff report dated April 18, 1973 for used 1966 through 1970 model year light-duty motor vehicles of engine size classifications c, d, e, and f;

WHEREAS, the Board has determined that the data submitted by the applicant indicate that the system when installed on engine size classes c, d, e, and f meets the requirements set forth in Health and Safety Code Sections 39177.3 and 39177.4 and the Board's further requirements contained in Title 13, California Administrative Code, Chapter 3;

WHEREAS, the system reduces oxides of nitrogen emissions from 1966 through 1970 model year light-duty motor vehicles of engine size classifications c, d, e, and f by more than forty-two percent on the average;

WHEREAS, Motors, Inc., an automotive warehouse distributor, has become a co-applicant on the Contignitron device;

WHEREAS, Motors, Inc., has demonstrated the marketing capability and financial responsibility required by the Board; and

WHEREAS, the Board by motion on May 16, 1973 approved the co-application of Motors, Inc., and removed the condition on the accreditation of the Contignitron device, as contained in Resolution 73-4, April 18, 1973;

NOW, THEREFORE, BE IT RESOLVED, that Resolution 73-4, dated April 18, 1973, is rescinded; and

BE IT FURTHER RESOLVED, that the oxides of nitrogen control device submitted by Contignitron Company and Motors, Inc., is hereby accredited as of May 16, 1973 pursuant to the provisions of Chapter 4, Part 1, Division 26 of the Health and Safety Code for used 1966 through 1970 model year light-duty motor vehicles for engines of size classifications c, d, e, and f.

Adopted July 18, 1973

EXHIBIT A-4

**State of California**
**AIR RESOURCES BOARD**

## EXECUTIVE ORDER G-19-3

**Relating to the Exemption of Accredited Oxides of Nitrogen Exhaust Emission Control Devices for 1966 through 1970 Model-Year Vehicles**

Pursuant to the authority vested in the Air Resources Board by Sections 39177 and 39177.2 of the Health and Safety Code; and

Pursuant to the authority vested in the undersigned by Section 39023 of the Health and Safety Code;

IT IS ORDERED AND RESOLVED: That the following 1966 through 1970 vehicles under 6,001 pounds gross vehicle weight are exempt from the installation of an accredited oxides of nitrogen exhaust emission control device:

1. All vehicles with engines having less than 50 cubic inch displacement.
2. All vehicles which operate on natural gas or liquefied petroleum gas (LPG). (Includes dual-fuel systems).
3. All vehicles originally equipped with engines having special intake or exhaust manifolds, ram air induction, multiple carburetors, turbochargers, or fuel injection.
4. All vehicles with engines equipped with an originally designed and approved device that meets the oxides of nitrogen standard.
5. All other vehicles exempt under Section 39177 of the Health and Safety Code.

A list containing examples of some vehicles which are affected by items 3, 4, and 5 is attached along with specific limitations for the various devices.

Executive Order G-19-2-C, dated November 14, 1973 is hereby rescinded.

Executed at Sacramento, California, this 26 day of March, 1974.

Original signed by

WILLIAM SIMMONS
Executive Officer

EXHIBIT A-5

**Attachment to Executive Order G-19-3**

*The following is an example of vehicles exempt under Section 39177 of the Health and Safety Code: Reference Executive Order G-19-3, Item #5.*

A. Vehicles with engines of 50 CID or greater cubic inch displacement equipped with Air Quality Products' "66-70 PURE POWER" high performance system (identified with a green label). THIS DEVICE MAY BE ADVERTISED AS A POLLUTION CONTROL DEVICE AS PROVIDED BY SECTION 39184(b) OF THE HEALTH AND SAFETY CODE.

B. Vehicles with engines greater than 200 cubic inch displacement equipped with Contignitron Company's "Model 48" and "Model 46" electronic ignition system. THESE DEVICES MAY BE ADVERTISED AS POLLUTION CONTROL DEVICES AS PROVIDED BY SECTION 39184(b) OF THE HEALTH AND SAFETY CODE.

C. All 1966-1970 Citroen, Fiat and Peugeot vehicles.

D. All 1967-1970 Saab vehicles equipped with a V-4 engine configuration.

E. All 1966-1967 Volkswagens equipped with air conditioning.

F. All 1966-1970 Ford Cortina G. T. vehicles.

G. All 1970 Mercedes Model 220/8 vehicles with engine type 150.920.

EXHIBIT B-1

**PRESENTED**

**STATE BOARD OF CONTROL**

JERRY D. KOVE
ATTORNEY AT LAW
8383 WILSHIRE BLVD. SUITE 622
BEVERLY HILLS, CALIFORNIA 90211
(213) 655-9530

(SPACE BELOW FOR FILING STAMP ONLY)

RECEIVED
APR 12 1976
STATE BOARD OF CONTROL

Attorney for Claimants

## CLAIM FOR DAMAGES FROM BREACH OF CONTRACT

TO THE STATE BOARD OF CONTROL OF CALIFORNIA:

This claim is presented by JERRY D. KOVE, ESQ., Attorney at Law, on behalf of BENITO L. POLO, an individual, and the CONTIGNITRON COMPANY, a California Corporation. The post office address of claimants is 7625-24 East Rosecrans Avenue, Paramount, California 90723, and all notices respecting this claim should be sent to Jerry D. Kove, Attorney at Law, 8383 Wilshire Blvd., Suite 622, Beverly Hills, California 90211.

The date and place of the transaction giving rise to this claim are during the periods of 1967 through and including April 24, 1975, in the State of California.

In the year 1967 the Legislature of the State of California enacted the Air Resources Act (Health and Safety Code Sections 39000 et seq) and subsequently amended said Sections by various enactments. In addition thereto the Legislature enacted Title 13, California Administrative Code, Chapter 3. Pursuant to said Acts, claimant Benito L. Polo some time thereafter designed a device and formed a company known as the Contignitron Company, a California Corporation, the pur-

pose of which was, pursuant to the requirements of said Acts, said device would be used on motor vehicles manufactured during the years 1966 through 1970.

Said device was known, among other names, as the CONTIGNITRON and also EQUALIZER, models 46 and 48, and was subsequently certified by the Air Resources Board for use on said vehicles pursuant to the authority vested in said Air Resources Board by Section 39177 and 39177.2 of the Health and Safety Code, and further pursuant to Section 39023 of said Health and Safety Code.

Based upon certain representations made by the State of California, through its legally elected and appointed authorities, claimants, in order to develop, satisfy the requirements of the State, and prepare for marketing said devices, expended at least the following sums:

| | | |
|---|---|---|
| a. | Loss of income by Benito L. Polo due to the fact it was necessary to resign from his permanent employment, the sum of..... | $ 120,000.00 |
| b. | Testing and development costs in the sum of. | 50,000.00 |
| c. | Rental of offices and manufacturing space in the sum of..... | 20,000.00 |
| d. | Personal investment for equipment, parts, machinery, and miscellaneous expenses, the sum of..... | 180,000.00 |
| e. | Cost of inventory now obsolete and valueless in the sum of..... | 100,000.00 |
| f. | Advertising in the sum of..... | 50,000.00 |
| g. | Loss of projected profits in the sum of..... | 1,800,000.00 |

On or about April 10, 1975, the Legislature passed certain legislation which in effect, with few exceptions, repealed the requirement that said 1966 through 1970 model year motor vehicles utilized a device of the type that claimants manufactured. On or about April 24, 1975, Governor Edmund G. Brown, Jr., signed said legislation into law.

## EXHIBIT B-3

Claimants Benito L. Polo, individually, and the Contignitron Company, base their claim upon all of the above circumstances and the fact that the State of California, through its legally elected and appointed authorities, has damaged said claimants as stated above by inducing them and causing them to detrimentally rely on the representations made by the State that if they would develop a device that would meet the State's requirements, a market for such a device would exist pursuant to the above cited conditions and certain sections of the Vehicle Code, and in addition thereto, claimants felt that the actions and representations of the State of California, through its legally elected and appointed authorities, constituted a contract with the State wherein if the claimant would develop an approved and certified device, the State would then enforce the use of said device.

The names of the public employees causing the said damage or loss are: Edmund G. Brown, Jr., Governor, State of California, the members of the State Legislature during said period, the members and employees of the Air Resources Board of the State of California, and other person or persons unknown at present.

The amount claimed as a result of said transaction as of the date of presentation of this claim is $2,320,000.00. This figure includes the amount of $1,800,000.00 as the estimated amount of prospective damage or loss, insofar as it is known at this time.

Dated April 9, 1976.

---

JERRY D. KOVE
Attorney for Claimants,
Benito L. Polo,
an individual, and Contignitron
Company, a California
Corporation.

EXHIBIT C

STATE OF CALIFORNIA
STATE BOARD OF CONTROL
926 J STREET, SUITE 300
SACRAMENTO, CALIFORNIA 95814

EDMUND G. BROWN JR., Governor

May 21, 1976

8775

Clifford S. Dicker
Attorney at Law
5000 Overland Avenue
Culver City, California 90230

Re: The Claim of BENITO L. POLO, an individual, and THE CONTIGNITRON COMPANY v. State of California—No. 50988

Dear Mr. Dicker:

The State Board of Control, at its meeting of May 18, 1976 denied the above-entitled claim.

Very truly yours,

E. F. VECLIA
Executive Secretary

CARY L. LONGHOLM
Assistant Executive Secretary

GLL: et
cc: Attorney General's office

**WARNING**

Subject to certain exceptions, you have only six (6) months from the date this notice was personally delivered or deposited in the mail to file a court action on the rejected claim, or the portion of the claim rejected. See Government Code Section 945.6. You may seek the advice of an attorney of your choice in connection with this matter. If you desire to consult an attorney, you should do so immediately.

MAY 26, 1976
B/C Denied 1/75

EXHIBIT D

**State of California**

**AIR RESOURCES BOARD**

**May 16, 1973**

**Staff Report**

# CONTIGNITRON COMPANY

## Application for Modification of a Conditionally Accredited Used Motor Vehicle Exhaust Emission Control Device for Oxides of Nitrogen (Equalizer Mod 46 and Mod 48)

### 1. Introduction

On April 18, 1973, the Board conditionally accredited the Equalizer Mod 4-8 Device, manufactured by the Contignitron Company, for the control of oxides of nitrogen in the exhaust emissions of used 1966-1970 model year vehicles with engine size classes (c) through (f). On April 20, 1973, Contignitron submitted a request to be allowed to modify the Mod 4-8 device. The modification consists of revisions to the electronic circuitry controlling the characteristic of the spark curve. The reason for this modification request, the manufacturer states, is to increase the spark advance at the higher engine speeds thereby reducing the adverse exhaust gas temperature effect cause by the retardation of the ignition timing. Contignitron maintains that the modification will not reduce the device's oxides of nitrogen control effectiveness. The Equalizer Mod 4-8 will be replaced with two devices for better control of the spark curve. The Equalizer Mod 46 will be used with 6 cylinder engine vehicles and the Equalizer Mod 48 with 8 cylinder engine vehicles.

Supreme Court, U. S.
FILED
NOV 3 1980
MICHAEL RODAK, JR., CLERK

IN THE
**SUPREME COURT OF THE UNITED STATES**

October Term, 1980

No. 80-176

DANA CORPORATION AND THE ECHLIN MANUFACTURING CO.,
*Appellants,*
v.
STATE OF CALIFORNIA AND LEGISLATURE OF THE STATE OF CALIFORNIA, et al.,
*Appellees.*

No. 80-177

CONTIGNITRON COMPANY,
*Appellant,*
v.
STATE OF CALIFORNIA AND LEGISLATURE OF THE STATE OF CALIFORNIA,
*Appellees.*

APPEAL FROM JUDGMENT OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

# MOTION TO DISMISS OR AFFIRM

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v.

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*Appellees.*

No. 80-177

CONTIGNITRON COMPANY,
*Appellant,*

v.

STATE OF CALIFORNIA AND LEGISLATURE OF THE STATE OF CALIFORNIA,
*Appellees*

APPEAL FROM JUDGMENT OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

## MOTION TO DISMISS OR AFFIRM

Appellees State of California, Legislature of the State of California and Edmund G. Brown Jr., as Governor of the State of California hereby move to dismiss the appeals filed in the above-titled cases, or to affirm the judgment of the Court of Appeal of the State of California.

This motion is filed pursuant to Rule 16 of the Supreme Court Rules and is taken on the grounds that:

1) The appeal is not within the jurisdiction of this Court because it was not taken in conformity to statute;

2) The federal question sought to be reviewed was not timely or properly raised;

3) The federal question sought to be reviewed was not expressly passed on;

4) The judgment rests on an adequate non-federal basis; and

5) The appeal does not present a substantial federal question.

This motion is based on the appendices filed by appellants in this matter and the brief in support of this motion filed herewith.

## BRIEF IN SUPPORT OF MOTION TO DISMISS OR AFFIRM

### I

### THE APPEAL IS NOT WITHIN THE JURISDICTION OF THIS COURT

Appellants assert that this Court has jurisdiction by virtue of 28 U.S.C. § 1257(2). (Jurisdictional Statement

in No. 80-176, p. 1; *id.* in No. 80-177, p. 3.) That subsection provides for jurisdiction:

> "By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

The appeal may not be taken under this section because (1) no statute's validity was drawn into question; and (2) no decision was made for or against the validity of any statute.

First, appellants seek compensation based upon the *repeal* of a statute which required the installation of pollution control devices on certain automobiles. They have simply not identified "a statute of any state" the validity of which they are challenging.

Even assuming the repeal of a statute is itself a "statute," appellants never questioned the *validity* of the repeal of the statute; indeed, they insisted upon it. No quarrel can be found in their pleadings or briefs to the state courts concerning the *validity* of the repeal. Appellants never argued that the repeal should be declared nugatory and installation of the devices pursuant to the repealed statute should be recommenced. All appellants sought was *compensation* pursuant to alleged contracts or quasi-contracts; the validity of a statute was never in issue. (See Appendix in No. 80-176, pp. 37, 56; *id.* in No. 80-177, p. 18.)

Likewise, the California Court of Appeal rendered no decision concerning the *validity* of the repeal. All the court held is that plaintiffs are not entitled to compensa-

tion on their various theories, including contract, quasi-contract and unjust enrichment. This is clearly outside the scope of any question concerning the validity of a statute and consequently outside the scope of this court's appellate jurisdiction.

II

## THE ISSUE OF THE VALIDITY OF THE REPEAL OF THE STATUTE WAS NOT TIMELY OR PROPERLY RAISED IN THE STATE COURTS.

As was set forth above, appellants never contested in the state courts the validity of the repeal of any state statute; indeed, they expressly renounced any argument that the repeal should be declared invalid and the former statute restored.

While appellants did raise in the state courts, with one major exception,[1] the various questions set forth in their Jurisdictional Statement (No. 80-176, pp. i–ii; No. 80-177, p. 2) none of *those* questions go to the validity of the repeal of the statute, and hence cannot be the basis of

[1] Each appellant asks this Court to determine whether the California Tort Claims Act can immunize appellees from their claims. Appellants Dana and Echlin contend that such immunization runs afoul of the Supremacy Clause (No. 80-176, p. ii) while appellant Contignitron alleges that such immunity would violate the Contract Clause (No. 80-177, p. 2).

Before the state courts, appellants limited their arguments to the *inapplicability* of the California Tort Claims Act on the ground that it applies only to causes of action in tort, whereas they alleged contractual-type causes of action. They never raised the question of whether the Tort Claims Act, if applicable, is constitutional. Consequently, this question could not be heard on appeal in this court.

this appeal. The issue of the validity of a state statute or repeal thereof was never raised.

III

## THE QUESTION OF THE VALIDITY OF A STATE STATUTE WAS NOT EXPRESSLY PASSED ON

Just as appellants did not raise any issue as to the validity of a state statute (*supra,* Argument II), so the California Court of Appeal did not rule on the validity of any state statute.

Rather the Court concluded that no cause of action had been stated for damages, and moreover that the complaint was, in reality, an action in tort of the sort barred by the California Tort Claims Act. (No. 80-176, Appendix, pp. 2–5; No. 80-177, pp. A-1–A-4.)

Moreover, the question noted above as to the constitutionality of the California Tort Claims Act, in light of the Supremacy Clause or the Contract Clause, was never addressed at all by the state court.

IV

## THE JUDGMENT RESTS ON AN ADEQUATE NON-FEDERAL BASIS

As appellants note, the California Court of Appeal ruled that the alleged "contract" between the parties was void *ab initio.* The Court thus accepted appellees' position that the State of California is not empowered to enter contracts whereby it promises not to exercise its police power in the future.

There is no federal common law concerning what contracts state and local governmental agencies are empowered to enter into. Decisions of state courts in this regard are binding on the Supreme Court. *R.R. Comm'n* v. *Los Angeles R. Co.* (1929) 280 U.S. 145, 152; *see Southern Iowa Elec. Co.* v. *Chariton* (1920) 255 U.S. 539, 546.

If, under state law, appellees were without power to enter into the alleged "contract," consideration of the "federal questions" concerning the constitutionality of the asserted abrogation of such contracts is precluded by the existence of an adequate state ground for the state court's decision.

## V

## THE APPEAL FAILS TO PRESENT A SUBSTANTIAL FEDERAL QUESTION

In light of the obvious lack of appellate jurisdiction in this case, it would be pointless to recapitulate the extensive refutation of appellants' sundry arguments which were presented to the California courts. The central and pervasive deficiency in appellants' pleading, however, may be simply and concisely stated.

Appellants saw a lucrative opportunity when the California Legislature created a captive market for automobile retrofit devices. When accepting the artificial financial opportunity created by statute, appellants necessarily accepted the concomitant risk—that the captive market would demand its freedom and that elected representatives would, in fact, represent their constituents. Appellants, however, are seeking to have the courts rec-

ognize a phantasmal "vested right" in the former state of the law. They successively seek to clothe this "right" in the garb of "contract," and "quasi-contract," and "unjust enrichment," and "inverse condemnation," but none of the costumes remotely fit.

If appellants' view of the law, summarily rejected by the California courts, were to be accepted by this Court, appellants' new doctrine, while without ancestors, would spawn numerous progeny. As but one example, a citizen who arranged his financial affairs in reliance on the state of the tax laws could demand damages if those laws were changed.

In short, no discussion of learned authority is required to recognize appellants' arguments as frivolous, as the California courts have done, and to inexorably conclude that the appeal poses no substantial federal question.

Respectfully submitted,
GEORGE DEUKMEJIAN,
*Attorney General of the State of California*

R. H. CONNETT
*Assistant Attorney General*

JOEL S. MOSKOWITZ
*Deputy Attorney General*

---

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